Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JERE LAWRENCE MOORE,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

September 27, 1994

QUESTION PRESENTED FOR REVIEW

The questions presented by this petition are:

Whether the panel below erred by holding that 18 U.S.C. §2252 is not unconstitutionally vague and overbroad; and

Whether the panel below erred by holding that if 18 U.S.C. §2252 is unconstitutionally vague that it is permissible at trial to judicially engraft a mens rea requirement into that statute.

LIST OF PARTIES

The parties to the proceeding below were the petitioner Jere Lawrence Moore and the respondent, the United States of America.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Jere Lawrence Moore, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgement of the United States Court of Appeals for the Eleventh Circuit entered in this action on June 30, 1994.

OPINION BELOW

The Eleventh Circuit Court of Appeals affirmed the petitioner's conviction in an unpublished opinion issued on June 30, 1994, in Jere Lawrence Moore v. United States, 28 F.3d 116 (11th Cir. 1994). The unpublished opinion below was previously released as a slip opinion, Jere Lawrence Moore v. United States, No. 93-2992 (11th Circuit, June 30, 1994), and is set forth in Petitioner's Appendix.

JURISDICTION

The opinion which petitioner asks this Court to review was entered by the United States Court of Appeals for the Eleventh Circuit on June 30, 1994. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case requires interpretation of the First, Fifth and Sixth Amendments to the

Constitution of the United States which provide:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech....
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law....
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation....

This case also requires interpretation and analysis of the constitutionality of 18 U.S.C. §2252.

STATEMENT OF THE CASE

The petitioner was tried in United States District Court for the Middle District of Florida on all counts of a three-count indictment which was returned on September 28, 1992. The petitioner was charged in Counts One and Two with having caused to be transported and shipped in foreign commerce a visual depiction, namely, a color photograph and a videotape, in contravention of 18 U.S.C. §2 and 2252(a)(1) and (b). The petitioner was charged in Count Three with having knowingly received a visual depiction that had been transported and shipped in foreign commerce in contravention of 18 U.S.C. §2252(a)(2)(b).

The petitioner filed his Third Motion to Dismiss on February 18, 1993. The petitioner relied on United States v. X-Citement Video, Inc., 982 F.2d 1283 (9th Cir.), cert. granted 114 S.Ct. 1186 (1994).

The district court denied that motion on February 18, 1993.

The petitioner proceeded to trial before the Honorable Harvey E. Schlesinger. On May 6, 1993 the jury returned a guilty verdict as to the petitioner on Counts Two and Three of the Indictment. The district court entered a judgment of conviction against the petitioner on August 13, 1993 and sentenced the petitioner to 21 months of imprisonment.

The petitioner filed a timely appeal to the United States Court of Appeals for the Eleventh Circuit. That court had jurisdiction over petitioner's direct criminal appeal pursuant to 28 U.S.C. §1291. The Eleventh Circuit Court of Appeals affirmed petitioner's conviction and sentence by its decision rendered on June 30, 1994. Petitioner now timely files this Petition for Writ of Certiorari.

REASON WHY THE WRIT SHOULD BE GRANTED

THE PANEL BELOW ERRED BY HOLDING THAT 18 U.S.C. §2252 IS NOT UNCONSTITUTIONALLY VAGUE. FURTHERMORE, THE PANEL BELOW ALSO ERRED BY HOLDING THAT IF 18 U.S.C. §2252 IS UNCONSTITUTIONALLY VAGUE THAT IT IS PERMISSIBLE AT TRIAL FOR A COURT TO JUDICIALLY ENGRAFT A MENS REA REQUIREMENT INTO THAT STATUTE.

This Court should grant certiorari to review the Eleventh Circuit Court of Appeals' decision in petitioner's case because that court sanctioned a departure from established law which deprived the petitioner of: his First Amendment right of free speech; his Fifth Amendment rights of trial upon an indictment and due process; and his Sixth Amendment right to be informed of the accusation against him. Significantly, this Court has granted certiorari to review a case raising identical issues in United States v. X-

Citement Video, Inc., 982 F.2d 1283 (9th Cir.), cert. granted 114 S.Ct. 1186 (1994).

The Indictment in this case tracked the statutory language of 18 U.S.C. §2252(a)(1) and (b), and 18 U.S.C. §2252(a)(2)(b). [Pet.App. 1-2]. The Indictment did not require the jury to find that the petitioner committed the charged acts knowing that the materials at issue contained depictions of a minor.

In denying appellant's third Motion to Dismiss the district court adopted the reasoning of the dissenting opinion in United States v. X-Citement Video, Inc., 982 F.2d 1285 (9th Cir. 1993), cert. granted 114 S.Ct. 1186 (1994). As grounds for this petition the petitioner adopts by reference the authorities set forth in the majority opinion, and those set forth in the certiorari petition, in the X-Citement Video case.

Additionally, in New York v. Ferber, 458 U.S. 747,765 (1982), and in Osborne v. Ohio, 495 U.S. 103, 115 (1990), this Court recognized that Congress may not declare an act involving visual depictions to be unlawful without requiring some element of scienter on the part of a defendant. This Court recently reiterated that principal in Staples v. United States, ____ U.S. ____, 128 L.Ed.2d 608(1994).

In Staples, this Court characterized the question to be decided as, "[w]hether the defendant must know of the particular characteristics that make his weapon a statutory firearm." 128 L.Ed.2d at 619. This Court rejected the Government's argument that the dangerous nature of a weapon should place that person on notice of likely statutory prohibitions, holding:

> Of course, we might surely classify certain categories of guns - no doubt including the

> machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation - as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades in [United States v. Freed, 401 U.S. 601 (1971)]. But precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential, while perhaps even greater than that of some items we would classify along with narcotics and hand grenades, cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to interpret [26 U.S.C. §5861(d)] as not requiring proof of knowledge of a weapon's characteristics.

Id. at 620 (footnote omitted). This Court went on to hold that the statute at issue, in Staples, was not one of the limited "public welfare offenses" and that it was error to have convicted the defendant without the Government having been required to prove the defendant knew the gun he possessed was unlawful. Id. at 624-25.

As in Staples, the statute at issue in this case failed to require the Government to prove that the petitioner caused the transport, shipping or receipt at issue with the knowledge that the items at issue contained depictions of minors. That deficiency renders 18 U.S.C. §2252 unconstitutionally vague and overbroad in contravention of the First, Fifth and Sixth Amendments to the Constitution of the United States.

The district court held that 18 U.S.C. §2252(a) could be saved by judicially engrafting a reckless mens rea requirement into the statute at trial. [Pet.App. 43]. The district court erroneously charged the jury in accordance with its holding. In his third Motion to Dismiss the petitioner challenged the facial validity of the Indictment issued in this cause. The panel below erred by disregarding binding

precedent which holds that an indictment which fails to charge all the elements of a crime must be dismissed. Russell v. United States, 369 U.S. 749, 765 (1962)(vacating conviction for deficient indictment stating, "'In an indictment upon a statue, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'", quoting United States v. Carll, 105 U.S. 611, 612).

The panel below disregarded its own precedent in reaching its decision. In United States v. Gayle, 967 F.2d 483 (11th Cir. 1992), the court held, "A criminal conviction will not be upheld if the indictment does not set forth the essential elements of the offense." Id. at 485.

Likewise, in Honea v. United States, 344 F.2d 798 (5th Cir. 1965), reversed in part on other grounds in United States v. Gayle, 967 F.2d 483 (11th Cir. 1992), the former Fifth Circuit reversed a conviction for false impersonation of a United States official pursuant to 18 U.S.C. §912 because the Indictment was insufficient on its face. Id. at 800, 804. The court, in Honea, looked to its past precedent finding:

> An indictment or information in the language of the statute [as here] ordinarily is sufficient, except where the words of the statute do not contain all the essential elements of the offense; but if the statute omits an essential element, the indictment must supply it with certainty.

Id. at 804, quoting Babb v. United States, 218 F.2d 538, 539 (5th Cir. 1955). The court, in Honea, went on to explain the importance of an indictment informing a

defendant of the charges against him. The court concluded:

> By his jury trial instructions . . . , the trial Judge obviously realized the necessity of this element under the statute. Of course, this did not cure the defect. We could not say with any assurance that the Grand Jury would have returned a true bill had this vital element been brought home to them.

Id. Accordingly, the court held the indictment was "fatally defective" and set aside the conviction. Id.

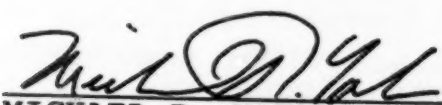
As in Honea, the Indictment in this case tracked the statutory language of 18 U.S.C. §2252(a)(1) and (b), and 18 U.S.C. §2252(a)(2)(b). [Pet.App. 1-2]. It is obvious from the face of the Indictment that the grand jury was never informed that there was a scienter requirement regarding the minority of at least one of the performers who engaged in the sexually explicit conduct at issue. While the district court may have

engrafted a recklessness requirement onto the statute in its instructions to the jury, the grand jury did not have the benefit of any such instruction. Accordingly, this Court should find that the panel below erred in sanctioning judicial engrafting at trial of a mens rea element into the Indictment against the petitioner.

CONCLUSION

For the reasons given above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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September 27, 1994

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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September 27, 1994

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, DIVISION

UNITED STATES OF AMERICA

v. Case No. _____
Cts. 1 & 2 18 U.S.C. §§
JERE LAWRENCE MOORE

Case No.	
Cts. 1 & 2	18 U.S.C. §§ 2252 (a)(1) & (b) & 2 (10 yrs/$250,000/both)
Ct. 3	18 U.S.C. § 2252 (10 yrs/$250,000/both)

INDICTMENT

The Grand Jury charges:

COUNT ONE

Between in or about November 1988 and in or about December 1988, in Columbia County, in the Middle District of Florida, and elsewhere,

Jere Lawrence Moore

the defendant herein, did knowingly cause to be transported and shipped in foreign commerce a visual depiction, the production of which visual depiction involved the use

of minors engaging in sexually explicit conduct and which visual depiction was of such conduct, that is, a color photograph which depicted lascivious exhibitions of the genitals and pubic area of minors.

In violation of Title 18, United States Code, Sections 2252(a)(1) and (b) and 2.

COUNT TWO

Between in or about November 1988 and in or about December 1988, in Columbia County, in the Middle District of Florida, and elsewhere,

JERE LAWRENCE MOORE

the defendant herein, did knowingly cause to be transported and shipped in foreign commerce a visual depiction involved the use of minors engaging in sexually explicit conduct and which visual depiction was of such conduct, that is, a videotape entitled "Funny Kids," which depicted lascivious

exhibitions of the genitals and pubic area of minors.

In violation of Title 18, United States Code, Sections 2252(a)(1) and (b) and 2.

COUNT THREE

Between in or about 1988 and on or about August 1, 1990, in Columbia County, in the Middle District of Florida, and elsewhere,

Jere Lawrence Moore

the defendant herein, did knowingly receive a visual depiction that had been transported and shipped in foreign commerce, the production of which visual depiction involved the use of minors engaging in sexually explicit conduct and which visual depiction was of such conduct, in that the defendant received a pictorial book entitled "Sandpipers," which had been transported and shipped in foreign commerce and which

depicted lascivious exhibitions of the genitals and pubic areas of minors.

In violation of Title 18, United States Code, Section 2252(a)(2) and (b).

FORFEITURE

In the course of committing the felony offenses alleged in Counts One, Two and Three of this Indictment pertaining to visual depictions of minor children engaged in sexually explicit conduct, defendant JERE LAWRENCE MOORE used and intended to use to commit said offenses certain property, namely:

a. one color photograph attached to the packaging entitled "Funny Kids,"

b. one videotape entitled "funny Kids;" and,

c. one pictorial book entitled "Sandpipers."

Upon conviction for the above-referenced counts of the Indictment, all

right, title, and interest of defendant JERE LAWRENCE MOORE in the above property shall be forfeited to the United States.

Pursuant to Title 18, United States Code, Section 2253(a).

A TRUE BILL.

_____

FOREMAN

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs. C a s e
No.: 92-220-Cr-J-20

JERE LAWRENCE MOORE

MOTION TO DISMISS

comes now the defendant, Jere Lawrence Moore, by and through undersigned counsel and files this his Motion to Dismiss the indictment heretofore filed in this cause and as grounds thereto would state:

1. The defendant is charged in a three-count indictment with violations of 18 U.S.C §2252.

2. The statute upon which Counts One, Two and Three of the indictment are based is unconstitutional because it does not require as an element knowledge of the minority of

at least one of the performers who engage in or portray the specified conduct. The statute violates the First Amendment to the United States Constitution.

WHEREFORE, the defendant respectfully requests this Honorable Court to dismiss the indictment filed in this cause.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant relies on United State v. X-Citement Video, Inc., 52 Crl 1286 (9th Cir., January 6, 1993), a copy of which is attached hereto as Exhibit "A," and by this reference made a part hereof.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.

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215 Washington Street
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(904) 356-9661
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Michelle Heldmyer, Esquire**, Assistant United States Attorney, 311 W. Monroe Street, 409 Post Office Building, Jacksonville, Florida 32201, by hand, this _____ day of January, 1993.

_____
ATTORNEY

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs. Case No.: 92-220-Cr-J-20

JERE LAWRENCE MOORE

UNITED STATES' RESPONSE TO
DEFENDANT'S MOTION TO DISMISS

The United States of America, by and through the undersigned Assistant United States Attorney, hereby files its response in opposition to defendant's Motion to Dismiss. The United States asserts that, for the reasons expounded below, the defendant's reliance upon United States v. X-Citement Video, Inc., No. 89-50556, slip op. (9th Cir. Dec. 16, 1992), is misplaced, and that 18 U.S.C. § 2252 as charged in the indictment at bar is constitutional.

FACTS

The indictment in this case reads in pertinent part as follows:

The Grand Jury charges:

COUNT ONE

Between in or about November 1988 and in or about December 1988, in Columbia County, in the Middle District of Florida, and elsewhere,

Jere Lawrence Moore

the defendant herein, did knowingly cause to be transported and shipped in foreign commerce a visual depiction, the production of which visual depiction involved the use of minors engaging in sexually explicit conduct and which visual depiction was of such conduct, that is, a color photograph which depicted lascivious exhibitions of the genitals and pubic area of minors.

In violation of Title 18, United States Code, Sections 2252(a)(1) and (b) and 2.

COUNT TWO

Between in or about November 1988 and in or about December 1988, in Columbia County, in the Middle District of Florida, and elsewhere,

JERE LAWRENCE MOORE

the defendant herein, did knowingly cause to be transported and shipped in foreign commerce a visual depiction involved the use of minors engaging in sexually explicit conduct and which visual depiction was of such conduct, that is, a videotape entitled "Funny Kids," which depicted lascivious exhibitions of the genitals and pubic area of minors.

In violation of Title 18, United States Code, Sections 2252(a)(1) and (b) and 2.

COUNT THREE

Between in or about 1988 and on or about August 1, 1990, in Columbia County, in the Middle District of Florida, and elsewhere,

Jere Lawrence Moore

the defendant herein, did knowingly receive a visual depiction that had been transported and shipped in foreign commerce, the production of which visual depiction involved the use of minors engaging in sexually explicit conduct and which visual depiction was of such conduct, in that the defendant received a pictorial book entitled "Sandpipers," which had been transported and shipped in foreign commerce and which depicted lascivious exhibitions of the genitals and pubic areas of minors.

In violation of Title 18, United States Code, Section 2252(a)(2) and (b).

Each count in the indictment alleges that the defendant knowingly violated 18 U.S.C. § 2252. In none of the plethora of pleadings filed in this cause to date is it alleged that a scienter element is missing from the indictment against the defendant.

MEMORANDUM OF LAW

I. THE SUPREME COURT HELD IN FERBER V. NEW YORK, THAT CHILD PORNOGRAPHY STATUTES MUST CONTAIN A SCIENTER REQUIREMENT AND THE VARIOUS COURTS OF APPEALS HAVE CONSISTENTLY INTERPRETED SECTION 2252 TO SO REQUIRE.

The defendant moves this court to dismiss the instant indictment on the ground that Section 2252 does not require, as an element, knowledge of minority of at least

one of the performers.[1] Defendant's Motion at 1. A review of the law of the various Circuits as well as the clear holdings of the Supreme Court reveal that Section 2252 has been construed as requiring some element of scienter and that the holding of the Court in X-Citement Video, is in conflict with those decisions and should not be followed.

The Supreme Court, in its seminal decision in the area of child pornography, held that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part

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[1]The case which the defendant cites in support of his motion to dismiss, United States v. X-Citement Video, Inc., No. 89-50556, 1992 U.S. App. Lexis 32542, at 10 (9th Cir. Dec. 16, 1992), is not binding in the Ninth Circuit since the mandate has not returned. The government is seeking en banc review, an action that stays the return of the mandate until disposition of the petition. See Fed. R. App. P. 41(a).

of the defendant." New York v. Ferber, 458 U.S. 747, 765 (1982). As the dissent in United States v. X-Citement Video, Inc., at 10, points out, however, the Court in Ferber did not specify what level of scienter is sufficient in a child pornography case. The Supreme Court addressed the issue in United States v. Osborne, 495 U.S. 103, 113 n.9 (1990), in the context of considering the constitutionality of Ohio's child pornography possession, finding unpersuasive "Osborne's contention that the statute is unconstitutionally overbroad because it applies in instances where viewers or possessors lack scienter." The Court instead held that "[a]lthough [the statute] does not specify a mental state, Ohio law provides that recklessness is the appropriate mens rea where a statute

'neither specifies culpability nor plainly indicates a purpose to impose strict liability'." Id. (quoting Ohio Rev. Stat. Ann. §2901.21(B) (1989)). Therefore, in light of the holding of the Supreme Court in Osborne, the government contends that, at a minimum, recklessness would satisfy the requirement that there be some level of scienter on the part of the defendant.

Various Courts of Appeals have also addressed the issue of whether there exists a scienter requirement in the statute and if so what it should be. Every Circuit has precedent either stating directly or implying indirectly that Section 2252 requires some scienter as to the contents of the material. In United States v. Knox, 977 F.2d 815, 825 (3rd Cir. 1992), the court held that "to fulfill the knowledge element

of section 2252, a defendant simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal." The court left "for another day the issue of whether a defendant must know that the subjects of the photograph or film are minors." Id. To be sure, in Knox, it is unclear how the court would resolve the issue of whether actual knowledge of minority is required. Nevertheless; it is clear that a scienter requirement has been found by the Third Circuit.

In Rodriguez v. Clark Color Laboratories, 921 F.2d 347 (1st Cir. 1990), the court addressed the issue of whether 18 U.S.C., § 2252(a)(2) applied to a photo processor. The court observed that

> [i]t would seem from a literal reading of section 2252(a)(2)

> that, if a photo processor, after observing the pornographic nature of the visual depiction, develops the negatives and mails the developed pictures to the sender, it would be in violation of that section. Indeed, under a literal reading of section 2252(a)(1), the processor would appear to be in violation of that section if it simply returns the undeveloped negatives knowing what they depicted. Id. at 349.

The triggering mechanism of the statute's reach, even as theorized by the First Circuit, is the concept of knowledge. The court focuses on the issue of what was known prior to either developing the film or returning after developing to the owner. Again, as in Knox, the statute is not treated as one creating strict liability but as a statute designed to criminalize intentional and knowing criminal conduct.

In United States v. Petrov, 747 F.2d 824 (2d Cir. 1984), the court considered the

liability of an operator of a confidential and uncensored photo-processing service on charges of conspiring to violate Title 18, United States Code, Section 2251. In refusing to find liability under Section 2251, the court undertook an analysis of the language of the statute as well as the legislative history; addressing not only section 2251 but 2252 as well. The court observed, in dictum, that the 1984 amendments to Section 2252, covering the knowing reproduction of visual depictions, might have been intended to cover photo processors. Id. at 828-829 (emphasis added). Liability without proof of knowledge or evidence that the defendant should have reasonably known the contents is

not contemplated or even hinted at in Petrov.[2]

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[2]See e.g., Unites States v. Osborne, 935 f.2d 32, 34 & n.2 (4th Cir. 1991)(words "knowingly received" were "intended to **protect persons who have received child pornography by mistake**; unlike such persons Osborne knew exactly what he ordered ***. [W]e adhere to a definition of "knowing receipt" which accords with the common-sense understanding of the term (emphasis added)."); United States v. Marchant, 803 F.2d 174, 176-77 (5th Cir. 1986)(the scienter element of 2252 is **knowingly receiving child pornography**; "when the receipt occurs *** with the consent of the possessor, it is more difficult to camouflage the fulsome scent of forbidden knowledge. here, there is a veritable sty full of facts and inferences from which to detect the fragrance of scienter."); United States v. Johnson, 855 F.2d 299, 306 (6th Cir. 1988)(defendant who was convicted, under 18 U.S.C. 1461, of receiving obscene child pornography in the mail, possessed sufficient knowledge; citing Marchant, supra, court finds that he knew the advertisement he was likely to receive would contain sexually explicit photographs of children); United States v. Duncan, 896 F.2d 271, 277-78 (7th Cir. 1990)(the court rejects defendant's argument that he lacked knowledge that the photographs he ordered would depict children engage in sexually conduct; titles, such as "Lolita" and "Loving Children", "scream[ed] 'child pornography***.'"); United States v. LaChapelle, 969 F.2d 632, 638 (8th Cir. 1992)(government introduced, as Rule 404(B) evidence, a child pornography video to rebut defendant's claim that he did not know that he ordered child pornography; court of appeals

In this circuit, the Court has held that the child pornography statute does not violate the constitutional right to privacy in United States v. Miller, 776 F.2d 978 (11th Cir. 1985). The Eleventh Circuit has consistently held the government to proof of scienter, and has affirmed convictions pursuant to Child Protection Act. See, e.g., United States v. Cross, 928 F.2d 1030 (11th Cir. 1983); United States v. Simpson, 904 F.2d 607 (11th Cir. 1990).

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recognizes that it was probative regarding "intent and knowledge" but its admission was error according to Jacobsen v. United States, 112 S.Ct. 1535 (1992)); United States v. Garot, 801 F.2d 1241, 1246-47 (10th Cir. 1986)(other child pornography admissible as appellants' knowledge of the contents of the package and their intent on its receipt as well as to proof of the absence of mistake in the controlled delivery (emphasis added)."); United States v. Thomas, 893 F.2d 1066, 1070 (9th Cir. 1990)(section 2252(a) does not require proof that defendant knew that pornography involved a minor).

The weight to be accorded the Ninth Circuit's opinion in X-Citement Video, must also be viewed against the backdrop of the intracircuit conflict which it has created. United States v. Thomas, 893 F.2d 1066 (9th Cir. 19990), and United States v. Moncini, 882 F.2d 401 (9th Cir. 1989), do present a conflict as to the appropriate statutory interpretation of the scienter element in Section 2252. (As Judge Kozinsk notes in dissent, however, neither case addresses constitutional issues. X-Citement Video, supra, n. 6 at 14542). In Moncini, the defendant, an Italian citizen, conceded that he knew that the material featured children in sexually explicit acts. He argued, nonetheless, that Section 2252's use of the word "knowingly" required the government to prove that he knew the mailing was illegal

under federal law. The court rejected Moncini's interpretation and noted that the "word 'knowingly' in § 2252(a) can at most be construed to modify 'mails' in conjunction with 'any visual depiction [as defined by statute].'" Moncini, supra, 882 F.2d at 405 (emphasis added). Knowledge of the visual depiction required that "the government prove that the defendant had knowledge of the nature of the contents of the visual depictions ***." Id. at 404.

Moncini did not specifically define "knowledge of the nature", mainly because as the majority notes, that was not an issue presented. Nonetheless, it did refer to United States v. Brown, 862 F.2d 1033 (3rd Circ.. 1988), and United States v. Marchant, 803 F.2d 174 (5th Cir. 1986), as two cases requiring knowledge that the material

contains child pornography and emphasized that Section 2252 does not require knowledge or the exact age of the minor. Moncini, at 404 and n.3.

In Thomas, the defendant argued at trial that the government must prove that he had knowledge of the minority status of the child and the court accordingly instructed the jury that, as to both the Section 2251 and 2252 counts, they must find that the defendant had scienter as tot eh minority of the child.[3] On appeal, Thomas argued, that the indictment was insufficient because it failed to allege knowledge as to Section 2252 count and that the trial court erroneously allowed evidence that he previously molested young girls as relevant

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[3]Thomas was charged with taking pornographic pictures of a thirteen year old girl in Mexico and then mailing them.

to show his scienter on the Section 2251 count. (In the interim, the Ninth Circuit had held in U.S. v. U.S. Dist. Court for Cent. Dist. of Cal., 858 F.2d 534 (9th Cir. 1988, that Section 2251 did not require specific scienter as to the child's minority.)

The Thomas panel held that the indictment was sufficient because, by its interpretation of the statute, "[t]he government was not required to allege that Thomas **knew** the victim was minor." Thomas, 893 F.2d at 1070 (emphasis added). The government submits that the Ninth Circuit in Thomas was ruling on the issue presented, the validity of the indictment and that the scienter of age which was proved, charged, and found by the jury was a proper construction and application of the statute.

To the extent the decision in X-Citement Video, supra, misinterprets the holding of Thomas, the X-Citement Video opinion is in error.

Therefore, in light of the clear error in X-Citement Video, in light of the intracircuit conflict which exists in the Ninth Circuit, and because the various courts of Appeals and the United States Supreme Court have consistently interpreted the section to require some level of scienter, Section 2252 is not constitutionally infirm.

II. THE LEGISLATIVE HISTORY OF THE STATUTE AND ITS AMENDMENTS SUPPORTS AN INTERPRETATION OF THE STATUTE WHICH INCLUDES A SCIENTER REQUIREMENT

Sections 2251 and 2252 of Title 18 were first enacted in the Protection of Children Against Sexual Exploitation Act of 1977. The Department of Justice commented on

Section 2252 and, in their written submissions to the two committees, Department representatives argued that the term "knowingly" should be omitted from proposed Section 2251, in order to avoid the implication that a producer of child pornography would have to have knowledge of the age of the child. The Department agree, however, that the term "knowingly" should be retained in the portion of the bill that was to become Section 2252. See H.R. Rep. 95-696, 95th Cong., 1st Sess. 21-22 (1977); S. Rep. 95-438 , 95th Cong., 1st Sess. 28-29 (1977). The Department noted that the legislative history of the statute should make clear that knowing the actual age of the child would not be an element of the offense, but that the bill was not intended to apply to innocent transportation of the

materials at issue, "with no knowledge of the nature or character of the material involved." Id. Significantly, this suggestion was made in conjunction with the Department's view that, because of constitutional considerations, Section 2252 would have to be limited so that it would reach only obscene materials. The committee agreed with the Department's suggestion in part, and omitted the word "knowingly" from Section 2251. Since Section 2252 was omitted from the bills altogether as they emerged fro the committees, the committee reports had no need to address the role of the term "knowingly" in that section.

On the floor of the Senate, Section 2252 was added into the bill. The Senate amendment (Roth-Hatch amendment) added Section 2252 to the bill in order to reach

the distribution of child pornography, even if the material was not legally obscene. See 123 Cong. Rec. 33047 (1977). However, the amended Section 2252 was limited to offenses committed "knowingly," a term that was not found in the version of Section 2251 that was then before the Senate. The Senate plainly focuses on the role of that term in Section 2252, as there was an exchange between Senators Roth and Percy during the floor debate that pertained to that precise point. Senator Percy said that he assumed that term meant that "he distributor or seller must have either first, actual knowledge that the materials do contain child pornographic depictions or, second, circumstances must b such that he should have had such actual knowledge, and that mere inadvertence [sic] or negligence would

not alone be enough to render his actions unlawful." 123 Cong. Rec. 33050 (1977). Senator Roth replied (ibid.):

> That is absolutely correct. This amendment limited as it is by the phrase "knowingly," insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography and thereby are actively contributing to the maintenance of this form of child abuse are subject to prosecution under this amendment.

The Roth-Hatch amendment passed. In conference, however, the Senate conferees backed off the position taken by the amendment. Although the Conference Committee agreed to include a proof that the material distributed by obscene. In other respects, the formula, adopted by the Roth-hatch amendment was retained. Section 2251 did not require that the conduct be "knowing," while Section 2252 did require

that the conduct be committed "knowingly." The Conference Committee report points out that the term "knowingly" was omitted from Section 2251 "with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child." The Conference committee did not expressly comment on the effect of leaving the term "knowingly" in section 2252. The Committee's only comment on that score was to say the following (S. Rep. 95-601, 95th Cong., 1st Sess. 7 91977); H.R. Rep. 95-811, 95th Cong., 1st Sess. 7 (1977):

> It is the intent of the conference committee that if a minor has engaged in this sexually explicit conduct and there was a production of material using any printed or visual medium depicting such conduct that person who knowingly transport, ship, or mail for the purpose of sale or distribution, or knowingly thereafter receive for sale or distribution, or

> knowingly thereafter sell or distribute for sale and such material are liable whether or not hey have contact with the minor or the original production of the material.

The only other reference to the issue of scienter relating to Section 2252 occurred during an exchange in the Senate hearing between Senator Culver, the principal sponsor of the legislation, and a witness. Senator Culver's remarks appear to reflect the view that using the term "knowingly" in the statute requires the government to prove that the defendant knows that the subject of the pornographic depiction is underage. The witness expressed the view in response to Senator Culver's question that such a requirement was reasonable. it was after that exchange that the term "knowingly" was omitted from Section 2251, but retained in Section 2252.

See Protection of Children Against Sexual exploitation: Hearing on S. 1585 Before the Subcom. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 1060107 (1977)

The statute has been amended twice since 1977. In 1984, Section 2252 was amended in light of the Ferber decision so as to permit prosecution of distributors and receivers of child pornography even when the materials were not legally obscene. The term "knowingly" remained in the statue, and there is no indication in the legislative history that Congress had any intention to alter whether that term should be read to require any further knowledge of the age of the child. In another change made in 1984, Congress amended the reference to "lewd exhibition of the genitals" as one of the

designated forms of sexually explicit conduct, and replaced it with the term "lascivious exhibition of the genitals." That change was made for the purpose of ensuring that the exhibition of the genitals did not have to be obscene before it would be within the statute. See 130 Cong. Rec. S3511 (daily ed. 1984). The statute was also amended slightly in 1986 and 1990 in a manner not material here.

A review of this legislative history makes clear then that Congress intended Section 2252 to cover only those individuals who knew or should have known what hey were transporting, distributing, or receiving. That Section 2251 does not require such knowledge of minority is consistent with the activity criminalized and similar prohibitions. Because the actual production

of child pornography involves a very different process from its distribution and receipt, i.e., actual contact with the children exploited, it is rational for Section 2251 not to require knowledge of the subject's age. Moreover, enticing a child to participate in the production of pornographic materials is similar to enticing a child to cross state lines for purposes of prostitution, within the meaning of the formed version of the "White Slave Traffic Act," 18 U.S.C. 2423. As the Department pointed out in its submission to Congress in 1977, the case law under Section 2423 held that knowledge of the child's age was not an element of the offense. That authority is applicable by direct analogy to Section 2251. by contrast, it is not applicable to the very different section of

the distribution, transportation and receipt provisions of Section 2252.

The government therefore contends that the legislative history and Congressional purpose[4] is served by an interpretation of Section 2252 to require that the government prove the defendant knew or should have known that the material he was engaged in distributing, receiving, or transporting constituted child pornography.

III. TITLE 18, UNITED STATES CODE, SECTION 2252, MUST BE CONSTRUED AS REQUIRING THAT THE DEFENDANT KNEW OR HAD REASON TO KNOW HAT THE DEPICTIONS CONSTITUTED CHILD PORNOGRAPHY

The Supreme Court has clearly stated that "criminal offenses requiring no mens

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[4]The Supreme Court, in blazing a trail for child pornography quite separate from the legal basis for obscenity, did so, because of the important truth that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Ferber, 458 U.S. at 757.

rea have a 'generally disfavored status'." Liparota v. United States, 471 U.S. 419, 426 (1985)(quoting from United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978). The Supreme Court has been equally clear in stating, however, that "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Hooper v. California, 155 U.S. 648, 657 (1895); Edward J. deBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988). Therefore, contrary to defendant's request that this Court dismiss the indictment on the ground that the Section fails to contain a scienter element, the government respectfully requests that this Court, if it finds that

the statue contains no scienter, construe the statue in order to save it.

As set forth above, various courts have interpreted Section 2252 to include a knowledge requirement. Nonetheless, even if this Court were to find that the statute contained no scienter requirement it would be bound to interpret the statute to so require.

Therefore, the government contends that, in light of the evidence relating to the defendant's activities relating to child pornography, it is clear that in this case only individuals who knew or had reason to know that they were causing child pornography to be transported and who threaten the very harms which Section 2252 seeks to address may stand accused.

CONCLUSION

In conclusion, for the reasons set forth herein, the government respectfully submits that the defendant's Motion to Dismiss should be denied without further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 28th day of January, 1993, to the following:

William J. Sheppard, Esq.
215 Washington Street
Jacksonville, Florida 32202

MICHELLE McCAIN HELDMYER
Assistant United States Attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs. Case No.: 92-220-Cr-J-20

JERE LAWRENCE MOORE

O R D E R

Before the Court is Defendant's Motion to Dismiss (Doc. No. 68, filed January 15, 1993). The government filed a response on January 28, 1993 (Doc. No. 70).

Defendant asserts that the statute under which he is charged, 18 U.S.C. §2252(a), is facially unconstitutional, and relies entirely upon the recent Ninth Circuit decision United States v. X-Citement Video, Inc., No. 89-50556, 1992 WL 367097 (9th Cir. Jan 6, 1993).

In a split decision, the Ninth Circuit held that §2252(a) violates the First Amendment because it does not require as an element "knowledge of the minority of at least one of the performers who engage in or portray the specified conduct." Id. at *7. To render all distributors and recipients of §2252(a) material "prima facie criminals" if, unknown to such a defendant, one of the performers is underage, would create an impermissible "chilling effect." Id.

Though not binding on this Court, the discussion in X-Citement Video is quite relevant to the prosecution of Defendant, who has been charged under the same statute which the split Ninth Circuit panel found unconstitutional. Nevertheless, the Court is not greatly moved by the legal conclusions the majority there made.

Instead, the Court is inclined to agree with the dissent, in which Judge Kozinski chided the majority for failing to properly heed the Supreme Court's holding in Osborne v. Ohio, 495 U.S. 103 (1990). In addressing the question of what level of scienter is sufficient in a child pornography case, the Court held that recklessness "plainly satisfie[d] the requirement laid down in Ferber[5] that prohibitions on child pornography include some element of scienter." Id. at 115. The mens rea issue, identical to that raised in the instant case, was in Osborne "squarely raised and

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[5]New York v. Ferber, 458 U.S. 747 (1982). There, the Supreme Court stated that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." Id. at 765. As both the government and Judge Kozinski mention, however, Ferber did not state with specificity what level of scienter is sufficient in a child pornography case. Osborne clearly did.

squarely resolved." X-Citement Video, 1992 WL 367097 at *8 (Kozinski, J., dissenting).

The Court would reiterate Judge Kozinski's conclusion that §2252(a) can and must be saved by reading into it a requirement that the defendant act recklessly as to the age of the minor. That is the position this Court takes. Accordingly, the Court finds that 18 U.S.C. §2252(a) is not facially unconstitutional, and the Motion to Dismiss (doc. No. 68) is **DENIED.**

DONE AND ORDERED at Jacksonville, Florida, this _____ day of February, 1993.

HARVEY E. SCHLESINGER

United States District Judge

Copies to:

Michelle McCain Heldmeyer, Esq.

William Sheppard, Esq.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-2992

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JERE LAWRENCE MOORE,

Defendant-Appellant.

Appeal from the United States District Court

for the Middle District of Florida

(June 30, 1994)

Before TJOFLAT, Chief Judge, COX and CARNES, Circuit Judges.

PER CURIAM:

In this appeal, appellant Moore challenges his convictions and sentence on two counts of a three-count indictment. He contends that the district court (1) erred in upholding the constitutionality of 18 U.S.C. § 2252, the statute on which the charges against him are based; (2) erred in refusing to dismiss the indictment because of prosecutorial misconduct (alleged) before the grand jury; (3) erred in refusing to find the counts of the indictment duplicitous and to dismiss them; (4) erred in denying his motion to suppress evidence; (5) erred in various evidentiary rulings at appellant's trial; and (6) erred in failing

to find, at the sentencing hearing, that appellant played a minor role in the offense and accepted responsibility for his conduct.

We reject appellant's several challenges as meritless. Finding no lawful reason to disturb appellant's convictions or sentences, we affirm.

AFFIRMED.

Supreme Court, U.S.
FILED
DEC 13 1994
OFFICE OF THE CLERK

(2)

No. 94-675

In the Supreme Court of the United States

OCTOBER TERM, 1994

JERE LAWRENCE MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
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6 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2252 (1988 & Supp. V 1993), which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face.

2. Whether the indictment in this case adequately alleged the essential elements of petitioner's offense.

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-675

JERE LAWRENCE MOORE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45-47) is unpublished, but the decision is noted at 28 F.3d 116 (Table). The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 40-44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1994. The petition for a writ of certiorari was filed on September 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of knowingly causing the transportation in foreign commerce of visual depictions of minors engaging in sexually explicit acts, in violation of 18 U.S.C. 2252(a)(1) (1988 & Supp. V 1993), and of knowingly receiving such a visual depiction, in violation of 18 U.S.C. 2252(a)(2) (1988 & Supp. V 1993). He was sentenced to 21 months' imprisonment, to be followed by three years of supervised release, and was fined $7,000. The court of appeals affirmed.

1. In February 1989, the Federal Bureau of Investigation (FBI) learned that petitioner, a fourth-grade school teacher, was on the mailing list of a Portuguese company under investigation for distributing child pornography. In September 1989, the FBI received a videotape featuring child pornography that had been mailed from Paris, France, to petitioner's post office box but was misdelivered to another box. In December 1989, the FBI learned that petitioner had received correspondence from a German distributor of child pornography. Gov't C.A. Br. 3-5.

Based on that information, the FBI obtained a search warrant for petitioner's residence. During the ensuing search, agents seized videotapes, magazines, and advertisements and order forms from child pornography distributors. One of the videotapes featured photographs of naked, pre-pubescent boys at the beach. Gov't C.A. Br. 6.

2. On appeal, petitioner contended that 18 U.S.C. 2252 (1988 & Supp. V 1993), which proscribes the transportation, shipping, receipt, distribution, and possession of child pornography, is unconstitutional in that it does

not require the government to prove that the defendant knew that the materials at issue showed minors engaging in sexually explicit acts. In an unpublished *per curiam* opinion, the court of appeals rejected that claim without discussion. Pet. App. 45-47.

ARGUMENT

1. Petitioner renews his contention that Section 2252 does not require proof of scienter as to the minority of the performer shown engaging in sexually explicit acts, and that the statute is therefore unconstitutional. On November 29, 1994, this Court issued its opinion in *United States* v. *X-Citement Video, Inc.*, No. 93-723, holding that Section 2252 requires knowledge of the minority of the performers depicted engaging in sexually explicit conduct and that the statute, so construed, is constitutional. Petitioner's claim is therefore without merit.

2. Petitioner argues (Pet. 10-14) that, even if Section 2252 is constitutional, his convictions should be reversed because the indictment failed to allege the requisite scienter.[1] That claim is not properly before this Court. Petitioner did not challenge the indictment on that ground in the district court. In the court of appeals, he raised the claim for the first time in his reply brief, and the court of appeals did not address it. Accordingly, petitioner has failed to preserve the claim for review by this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

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[1] In *X-Citement Video*, this Court declined to address the issue whether the indictment in that case "was fatally defective because it did not contain a scienter requirement on the age of minority," slip op. 15, because the court of appeals had not reached the issue.

In any event, petitioner's challenge to the indictment is without merit. Counts 2 and 3 of the indictment, on which petitioner was convicted, closely tracked the language of Section 2252, charging petitioner with "knowingly" causing the transportation in foreign commerce of visual depictions of minors engaging in sexually explicit acts, and with "knowingly" receiving such a visual depiction. Pet. App. 2-3. In light of this Court's holding in *X-Citement Video* that the word "knowingly" in Section 2252 applies to the minority of the performer, the indictment adequately alleged the essential elements of the offense. See *United States* v. *Cochran*, 17 F.3d 56, 61 (3d Cir. 1994), cert. denied, No. 93-8697 (Dec. 5, 1994).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

DECEMBER 1994

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[2] In refusing to dismiss the indictment, the district court construed Section 2252 to require "recklessness" with respect to the minority status of those depicted engaging in sexually explicit conduct. See Pet. App. 40-43. The court appears to have instructed the jury in accordance with that standard. See Pet. 10. Petitioner did not contend in either of the courts below, however, that the jury instructions improperly permitted him to be convicted on the basis of recklessness rather than knowledge, nor does he advance such a claim in this Court.